No. 14-95

In The Supreme Court Of The United States

PATRICK GLEBE, SUPERINTENDENT
STAFFORD CREEK CORRECTIONS CENTER,

PETITIONER,

v.

JOSHUA JAMES FROST,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent offers several reasons why this Court should deny certiorari. None withstands scrutiny.

First, Frost claims that because habeas cases are not the proper forum to extend this Court's precedent, this case is a "poor vehicle" to assess the scope of *Herring v. New York*, 422 U.S. 853 (1975). Br. Opp'n 9. But this argument would call for denying certiorari in every habeas case, and ignores that the Ninth Circuit in this case did exactly what Frost recognizes courts should not do in habeas cases: it created new law on an issue never resolved by this Court.

Frost also asserts that the Ninth Circuit's decision will affect only the rare case. But this was an en banc decision of the Nation's largest circuit court holding that "preventing a defendant from arguing a legitimate defense theory constitutes structural error." App. 11a. This broad holding calls into question any conviction in the Ninth Circuit in which a trial court ruling "prevent[ed] a defendant from arguing a legitimate defense theory" in closing. App. 11a. Such errors are far from rare, ranging from time limits on closing argument to rulings earlier in a trial that limit a defendant's ability to argue his preferred theory in closing.

Frost next claims that there is no conflict between the Ninth Circuit's decision and decisions of other courts because, in his view, no other case involved every element present here. But the Ninth Circuit's holding was clear: "Precluding defense counsel from arguing a legitimate defense theory

would, *by itself*, constitute structural error." App. 12a (emphasis added). As the State pointed out in its petition, there are many contrary cases. Frost cannot wish them away by reframing what the Ninth Circuit actually held.

Finally, Frost claims there is no conflict with this Court's cases because *Herring* established a broad right to present "proper argument" in summation. But *Herring* addressed only the complete denial of closing argument. The Ninth Circuit granted relief here only by impermissibly relying on its own precedent and ignoring this Court's cases.

ARGUMENT

A. This Case Is An Excellent Vehicle To Consider An Important Issue

1. Frost's Objection To This Case As A Vehicle Would Preclude Review In Every Habeas Case

Frost claims that this case is a poor vehicle because it is a habeas case, so the issue would be whether the law is "clearly established." He argues that the Court would thus be unable to provide broad "guidance." Br. Opp'n 9. But if that were a legitimate objection to granting certiorari, the Court would never take habeas cases. Of course, the Court hears many such cases every term, and with good reason. Habeas cases allow the Court to clarify what principles are and are not clearly established, an important responsibility given the thousands of habeas cases federal courts hear every year and the federalism implications of overruling long-final state

convictions. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (recognizing "AEDPA's purpose to further the principles of comity, finality, and federalism"). Such review is particularly important where, as here, the issue involved is significant and has caused confusion in lower courts.

2. The Question Presented Is Important.

Frost also claims that certiorari is unwarranted because the type of error here "is rare" and the Ninth Circuit's ruling will impact only cases "involving exactly this type of" error, i.e., where a judge erroneously prevents a defendant from arguing inconsistent defenses in closing. Br. Opp'n 9. He can make these claims only by ignoring what the Ninth Circuit held.

As Frost admits, the Ninth Circuit "'held that preventing a defendant from arguing a legitimate defense theory constitutes structural error.'" Br. Opp'n 16 (quoting *Frost v. Van Boening*, 757 F.3d 910, 916 (9th Cir. 2014)). This broad ruling will have significant consequences, because any number of trial errors effectively "prevent[] a defendant from arguing a legitimate defense theory." Br. Opp'n 16 (quoting *Frost*, 757 F.3d at 916). As Judge Tallman's dissent pointed out, for example, "if structural error is found in this case, how could we say that structural error does not also occur when a trial judge improperly excludes exculpatory evidence without regard to materiality and forbids defense counsel from commenting on it in closing?" App. 26a-27a. Indeed, a district court in the Ninth Circuit has already relied on *Frost* to grant habeas relief where

the trial court's exclusion of evidence prevented a defendant from arguing a theory in closing. *See DaSilva v. Law*, No. CV 13-25-gf-dwm-rks, 2014 WL 2004385 (D. Mont. May 15, 2014) (finding structural error and granting habeas relief based on *Frost* where state court barred defendant from presenting evidence as to whether prior conviction counted as a "sexual offense" under state law).

Similarly, as Judge Tallman pointed out, under the majority's ruling, "[s]tructural error may also be found when a trial judge improperly restricts closing argument by imposing time limitations that necessarily require the defense to choose among multiple arguments to emphasize during summation." App. 27a. This issue arises frequently and courts routinely review such time limits for abuse of discretion and require a showing of prejudice.[1]

Moreover, the Ninth Circuit's broad rule could require a finding of structural error "when[ever] a judge adopts any number of limitations that inhibit defense counsel from making their most effective and comprehensive arguments supporting a defendant's innocence[.]" App. 27a. For example, if the court erroneously precluded defense counsel from arguing that his client's confession was coerced or from asking a witness about the deal he received from the prosecution, that would "prevent[] a defendant from

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[1] *See, e.g.*, *United States v. Okoronkwo*, 46 F.3d 426, 437 (5th Cir. 1995); *United States v. Bednar*, 728 F.2d 1043, 1049 (8th Cir. 1984); *United States v. Barrett*, 766 F.2d 609, 621 (1st Cir. 1985).

arguing a legitimate defense theory[.]" App. 11a. Such errors are common enough that both have been reviewed by this Court, and this Court reviewed them for harmlessness. *See Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (trial court barred evidence that confession was coerced); *Delaware v. Van Arsdall*, 475 U.S. 673, 674 (1986) (trial court barred questioning about witness's deal with prosecution).

As these examples illustrate, it is far from "rare" for a trial court error to "prevent[] a defendant from arguing a legitimate defense theory[.]" App. 11a. Such errors occur regularly, and are routinely reviewed for harmlessness under this Court's precedent. The largest Circuit in the country has adopted a contrary rule in an en banc opinion. This issue is important.

B. The Ninth Circuit's Decision Conflicts With Decisions Of Many Other Courts

1. The Vast Majority Of Courts Review Restrictions On Closing Argument For Harmlessness

The Ninth Circuit deemed it clearly established federal law "that preventing a defendant from arguing a legitimate defense theory constitutes structural error." App. 11a. The State's petition cited many contrary cases. Pet. at 24-28. Unable to distinguish these cases, Frost relegates most to a footnote, Br. Opp'n 11 n.2, offering two unsupportable distinctions. Both fail.

First, Frost claims that none of these cases "involv[ed] exactly this type of" error. Br. Opp'n 9. But the question this Court considers is not whether

lower courts reach different results on the exact same facts—the Court would never hear a case under that test. Rather, the question is whether lower courts disagree "on the same important matter[.]" R. 10(a). Here, there is a conflict as to whether it is clearly established "that preventing a defendant from arguing a legitimate defense theory constitutes structural error." App. 11a.

Second, Frost claims that none of the other cases involved what he contends occurred here: both "complete preemption of a legitimate defense theory and . . . lower[ing] the state's burden of proof." Br. Opp'n 11. This is beside the point and incorrect.

It is beside the point because the Ninth Circuit did not require both of these elements to find structural error. Instead, the Ninth Circuit said that "[p]recluding defense counsel from arguing a legitimate defense theory would, *by itself*, constitute structural error." App. 12a (emphasis added). Frost cannot distinguish this holding from other cases by modifying it after the fact.

Frost's distinction is also incorrect, as many of the cases the State cited did involve a court completely preventing a defendant from presenting a theory and effectively lowering the prosecution's burden of proof. For example, in *United States v. Poindexter*, 942 F.2d 354 (6th Cir. 1991), defense counsel wanted to argue that the lack of fingerprint evidence established reasonable doubt, a legitimate theory contesting the prosecutor's burden of proof. The Sixth Circuit reviewed the error for harmlessness. *Id.* Similarly, in

United States v. DeLoach, 504 F.2d 185 (D.C. Cir. 1974), defense counsel sought to argue in closing that the key witness against the defendant might have committed the murder himself. *Id.* at 189. The trial court barred this argument, helping the state meet its burden of proof and "entirely preclud[ing] counsel from arguing for the several inferences on which his case crucially depended." *Id.* at 190. But the D.C. Circuit reviewed for harmlessness. *Id.* at 191-93.

Attempting to distract from these examples, Frost focuses on *Richardson v. Bowersox*, 188 F.3d 973 (8th Cir. 1999), which the State cited in passing as one of three Eighth Circuit cases reviewing a restriction on closing argument for harmlessness. Pet. at 24. Frost does not dispute the key point: the Eighth Circuit has repeatedly held that restrictions on closing argument are reviewed for harmlessness. Indeed, in *United States v. Wilcox*, 487 F.3d 1163 (8th Cir. 2007), the Eighth Circuit case the State described as "most analogous," Pet. at 25, but that Frost relegates to a footnote, the trial court completely barred the defendant from arguing the lack of physical evidence. The Eighth Circuit nonetheless "conclude[d] that any error in foreclosing this argument was harmless." *Wilcox*, 487 F.3d at 1173.

Frost also cannot meaningfully dispute that several state courts have adopted a rule contrary to the Ninth Circuit, holding that a defendant must show harm even from a significant restriction on closing argument. *See, e.g.*, *Lemos v. State*, 130 S.W.3d 888, 892 (Tex. Ct. App. 2004); *Nelson v. State*, 792 N.E.2d 588, 592 (Ind. Ct. App. 2003).

Even the state cases that Frost cites to suggest the absence of conflict actually prove the opposite. Frost cites *State v. Arline*, 223 Conn. 52 (1992). But, as the State noted in its petition, in deeming the restriction on closing argument there structural error, the Connecticut court did not even cite *Herring*, even though it cited *Herring* elsewhere. *Id.* at 63. Meanwhile, *Herdt v. State*, 816 P.2d 1299 (Wyo. 1991), does appear to treat *Herring* as resolving whether a restriction on closing argument is structural error, but this merely shows that, of the many courts to address this issue, one agreed with the Ninth Circuit. This only enhances the conflict.

In short, Frost cannot hide from the many cases the State cited that conflict with the rule adopted by the en banc Ninth Circuit here.

2. The Ninth Circuit Stands Alone In Suggesting It Is Unconstitutional To Require A Defendant To Admit The Elements Of An Offense To Claim An Affirmative Defense

The Ninth Circuit's decision conflicts with decisions of many other courts in another important respect. The majority indicated that by requiring Frost to choose between his inconsistent defenses, the trial court deprived him "of the fundamental right to demand that a jury find him guilty of all the elements of the crime." App. 13a (internal quotation marks omitted). But many states require a defendant to admit the elements of an offense before pleading an affirmative defense, and courts have routinely upheld such requirements. *See* Pet. at 28-30; Amicus Br. Arizona et al. 7-11.

Frost's argument that these cases are not in conflict with the decision below cannot bear analysis. He suggests that because Washington law allows a defendant to argue both that he did not commit the offense and that he committed the offense under duress, the Ninth Circuit's holding does not call into question the rules in states that prohibit such arguments. But for one thing, those states disagree. *See* Amicus Br. Arizona et al. 11-17. Moreover, the Ninth Circuit's opinion refutes Frost's distinction. The court did not say that where state law allows a defendant to argue in the alternative, he must be allowed to do so. Instead, the court said that requiring Frost to admit the elements of the offense to claim an affirmative defense "was tantamount to a directed verdict on guilt" and thus plainly unconstitutional. App. 13a. Under the Ninth Circuit's unsupportable reasoning, a state law requiring such a "directed verdict" would not avoid the constitutional problem. Thus, Frost's purported distinction cannot eliminate this conflict.

C. The Ninth Circuit's Decision Conflicts With Decisions Of This Court

1. The Ninth Circuit Improperly Relied On Its Own Precedent

The Ninth Circuit again ignored this Court's repeated admonition that circuit precedent does not constitute "clearly established Federal law, as determined by the Supreme Court[.]" 28 U.S.C. § 2254(d)(1). Frost offers two responses to this error.

First, Frost claims that *Herring* established that a restriction on arguing a "legitimate defense theory" is structural error, and that the Ninth

Circuit just applied this rule. *See, e.g.*, Br. Opp'n 7, 10-11. But the term "legitimate defense theory" is not found in *Herring* or any other Supreme Court decision. Instead, it is found only in circuit cases. Indeed, the Ninth Circuit, citing its own cases, noted: "*[W]e* have held that preventing a defendant from arguing a legitimate defense theory constitutes structural error." *See* App. 11a (emphasis added). This Ninth Circuit test is what did the work here.

Second, Frost claims there is no need for this Court to address this issue because "this Court has already settled that circuit law may not form the basis of habeas corpus relief." Br. Opp'n 15. This rule is abundantly clear, but the Ninth Circuit often "fail[s] to comply" with it anyway. *Lopez v. Smith*, No. 13-946, 2014 WL 4956764, *1 (U.S. Oct. 6, 2014) (per curiam). This failure continues, as evidenced by this case, App. 11A n.1, *Lopez*, and others, *see, e.g.*, *Woods v. Sinclair*, 764 F.3d 1109, 1121 (9th Cir. 2014) (considering circuit precedent), and warrants this Court's review.

2. The Ninth Circuit Went Beyond Any Holding Of This Court In Deeming The Error Here Structural

The Ninth Circuit's decision also conflicts with holdings of this Court because it interpreted *Herring*'s holding far too broadly and ignored this Court's cases on structural error.

As explained in the petition, neither *Herring* nor any decision of this Court clearly establishes that an erroneous limitation on closing argument is structural error. Pet. at 15-19.

The Ninth Circuit evaded this problem by concluding that this case "is easy because the Supreme Court has determined that *Herring* error is structural." App. 10a. Frost similarly claims that this case involves "*Herring* error." Br. Opp'n 16. But these assertions beg the question: was the error here "*Herring* error" at all given the dramatic difference between a judge prohibiting closing argument and requiring a defendant to choose between inconsistent defenses?

Like the Ninth Circuit, Frost seeks to avoid this question by claiming that *Herring* establishes "the right to present proper argument on the evidence and applicable law in summation[.]" Br. Opp'n 17. But *Herring* recognized no such broad right, and this is exactly the sort of generalized description of precedent that this Court has rejected in applying 28 U.S.C. § 2254(d). *See, e.g.*, *Lopez*, 2014 WL 4956764, at *3 ("We have before cautioned the lower courts—and the Ninth Circuit in particular—against 'framing our precedents at such a high level of generality.'" (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam))).

If *Herring* clearly established such a broad rule, then far more trial errors would be structural. Whenever a court misstated the "applicable law," Br. Opp'n 17, excluded evidence that would have allowed another argument in closing, or limited questioning of a witness in a way that prevented attacking his credibility in closing, the court would presumably have violated this clear "right to present proper argument[.]" Br. Opp'n 17. But this Court has reviewed each of these types of error for harmlessness. *See, e.g.*, *Pope v. Illinois*, 481 U.S. 497

(1987) (applying harmless error review where court misstated element of the offense); *Crane*, 476 U.S. 683 (same where court barred defendant from introducing evidence that confession was coerced); *Van Arsdall*, 475 U.S. 673 (same where court barred defendant from questioning witness about deal with prosecution).

Frost attempts to distinguish these cases by claiming that "*Herring* is limited to summation," while these cases involved errors at other points. Br. Opp'n 30. But these errors clearly affected summation by limiting the defendant's arguments. If the error in this case was structural, these would have been as well.

In a last ditch effort to broaden *Herring*, Frost suggests that its holding incorporates many state court cases it cited addressing lesser restrictions on closing argument. Br. Opp'n 20-21 & nn.4-6. But this Court has never suggested that state court cases it cites become "clearly established Federal law, as determined by the Supreme Court[.]" 28 U.S.C. § 2254(d)(1). Such a rule would make the task of state courts reviewing criminal convictions impossible, forcing them to scour every citation in this Court's opinions to discern the law. That cannot be right. Indeed, many of the cases cited in *Herring* rejected time limits on closing argument of over an hour.[2] If *Herring* clearly establishes that such limits

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[2] Br. Opp'n 21 n.6 (citing *State v. Ballenger*, 24 S.E.2d 175 (S.C. 1943) (rejecting one-hour time limit); *State v. Mayo*, 85 P. 251 (Wash. 1906) (rejecting ninety-minute time limit); *Weaver v. State*, 24 Ohio St. 584 (1874) (reversing five-hour time limit)).

are structural error, innumerable convictions are invalid. *See supra* n.1 (citing cases affirming far shorter time limits).

In short, Frost cannot reconcile the Ninth Circuit's holding with this Court's decisions.

CONCLUSION

For the reasons stated above, this Court should grant certiorari.

RESPECTFULLY SUBMITTED.

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